

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs October 24, 2007

COREY LAMONT RADLEY v. STATE OF TENNESSEE

**Direct Appeal from the Criminal Court for Davidson County
No. 2001-B-1114 Steve Dozier, Judge**

No. M2007-00462-CCA-R3-PC - Filed December 10, 2007

A Davidson County jury convicted the Petitioner, Corey Lamont Radley, of second degree murder, and the trial court sentenced him as a violent offender to twenty-five years in prison. The Petitioner filed a petition for post-conviction relief claiming that he received the ineffective assistance of counsel, and the post-conviction court dismissed the petition after a hearing. The Petitioner appeals the dismissal, contending that his trial counsel was ineffective for not calling a witness at his motion for a new trial hearing who would have testified that he overheard jurors in the Petitioner's case improperly discussing the Petitioner's case. After a thorough review of the record and applicable law, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgement of the Criminal Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and J.C. MCLIN, J., joined.

Ryan C. Caldwell, Nashville, Tennessee, for the Appellant, Corey Lamont Radley.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Lacy Wilber, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; Jon P. Seaborg, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

The Petitioner was originally indicted for first degree murder. A jury convicted the Petitioner of the lesser included offense of second degree murder. The Petitioner appealed, and in our decision on that appeal, we described the facts as follows:

Jeremy Lamont Mallard testified that he had been friends with the victim, Jesse Belser, since the early 1990s. He knew that the victim dealt in kilos of cocaine, and [he] admitted that he dealt in kilos of cocaine as well. Indeed, the

two men occasionally transacted cocaine deals with one another. Mr. Mallard acknowledged that, at the time of his testimony, he was serving a 292-month sentence in federal prison for participating in a conspiracy to distribute cocaine.

At about 1:30 in the afternoon on Friday, February 21, 1997, Mr. Mallard was driving to TSU. At an intersection near campus, he saw the victim standing by himself. Mr. Mallard parked his car and joined the victim. The victim was planning on meeting someone at that location. They conversed for about ten minutes, during which time the victim retrieved two kilos of cocaine from his car to give Mr. Mallard. Mr. Mallard was going to "move" these drugs for the victim, but his customer called and cancelled the buy. Accordingly, Mr. Mallard gave the cocaine back to the victim, who returned it to the car.

As the men were talking, the Defendant, who Mr. Mallard knew as "Rabbit," and someone else pulled up in a green, four-door car. The Defendant was sitting in the passenger seat. Mr. Mallard told the victim that he was going to go; the victim said "okay" and walked over to his car. There, according to Mr. Mallard, the victim retrieved a bag from the same location from which he had earlier gotten the cocaine for Mr. Mallard. The Defendant got out of his car, and the victim gave the bag to him. The Defendant put the bag in the backseat of his car and shut the door.

By this time, Mr. Mallard had returned to his car and was adjusting his CD player. He saw the driver of the Defendant's car get out and look around "like he was looking for the police or something." The Defendant and the victim were conversing next to the Defendant's car. Mr. Mallard pulled out of his parking place and began to drive by the Defendant's car. As he drove by, he saw the victim turn toward him. The Defendant was behind the victim, and Mr. Mallard saw him shoot the victim in the back of the head. Mr. Mallard testified that the victim fell, "and [the Defendant] shot 'im, like, three or four more other times." Mr. Mallard left the scene at once.

On cross-examination, Mr. Mallard admitted that he was to receive a fifty-percent reduction in his federal prison sentence for his truthful testimony in this case.

The police were called at approximately three o'clock. When they arrived at the scene, they determined that the victim was dead. Crime scene investigators found approximately \$9,000 in cash in the victim's clothes and a bag containing a box of washing detergent near the victim's body. No shell casings were found. A search of the Defendant's apartment produced no evidence. An autopsy was performed on the victim, revealing that the victim had been shot twice in the head, causing his death. One of the bullets was recovered, but no matching weapon was found. Mr. Mallard went to the police station voluntarily on the night of the shooting and gave a statement to Detective Kent McAllister in which

he identified the Defendant as the shooter. He also selected the Defendant's photograph from a photographic line-up containing six photographs. On this basis, the police arrested the Defendant.

Mr. Mallard admitted that he had not appeared at the Defendant's preliminary hearing, although it was repeatedly continued. Mr. Mallard testified that he did not appear because his wife had been shot, and he chose to disappear from Nashville. Eventually Det. McAllister learned that Mr. Mallard was in federal custody. In March 2001, Det. McAllister interviewed Mr. Mallard again about the shooting. Mr. Mallard again identified the Defendant as the shooter. Det. McAllister testified that the Defendant was indicted in June 2001, and that Mr. Mallard's grandmother was shot in her home shortly thereafter. Det. McAllister acknowledged that Mr. Mallard did not tell him anything about the cancelled drug deal between himself and the victim until the March 2001 interview.

Jack Day Reese testified on behalf of the Defendant. He stated that he worked for Colonial Construction Company and that the Defendant worked with him. He testified that he remembered the day of the shooting because that was the day the Defendant was arrested. Mr. Reese testified that the Defendant had been with him that afternoon and that they worked until about 3:30 or 3:45 when they returned to the office. The Defendant's paychecks for the weeks of January 31, February 7, February 14, and February 21, 1997, were also introduced. Each check was in the amount of \$500.

State v. Corey Lamont Radley, No. M2003-01466-CCA-R3-CD, 2004 WL 794697, at *1-2 (Tenn. Crim. App., at Nashville, Apr. 14, 2004), *perm. app. denied* (Tenn. Oct. 4, 2004). We affirmed the Petitioner's conviction and sentence on direct appeal.

Subsequently, the Petitioner filed a timely pro se petition for post-conviction relief in which he alleged that he received the ineffective assistance of counsel. The trial court appointed counsel, who filed an amended petition and represented the Petitioner at a hearing on the petition. The petition included several allegations, but the only allegation pursued on appeal is that his trial counsel was ineffective for not calling a witness, Joe Martin, who would have testified that he overheard jurors improperly discussing the Petitioner's case. At the post-conviction hearing, the following evidence relevant to this appeal was presented: The Petitioner testified he was familiar with a fellow inmate, Joe Martin, whom he met during his trial in 2002. Martin told the Petitioner that he saw some of the trial jurors who decided the Petitioner's case discussing the facts of the case. The Petitioner recalled that the judge inquired about this fact at the hearing on the Petitioner's motion for new trial, and his trial counsel ("Counsel") said that he would look into the matter. The Petitioner said, however, that Counsel never talked to Martin, saying that he could not find him. On cross-examination, the Petitioner conceded that he gave Counsel the name "Joe Smith" and not "Joe Martin" when referring to the man who had heard the jurors discuss his case.

Joe Davis Martin testified that on December 4, 2002, he was at the courthouse for a hearing on his post-conviction motion. He passed a couple of people who were smoking and talking about how much longer they would be in court. He heard a lady ask a man how much longer they would be there, and the man said “not long, all we have to do is go in there and find him guilty.” Martin then asked the people to hurry up because he had been at court all day, and he had to wait to leave until a verdict in the case was returned. Martin testified that he knew that the people smoking were jurors involved with the Petitioner’s case because he and the Petitioner were the only people left at the courthouse and Martin’s case was not a jury trial. Martin said that he did not hear these people discussing any of the factual details of the case, and he heard their conversation for less than a minute. On cross-examination, Martin testified that he had spent time with the Petitioner while the two were in jail at “Charles Bass.” He said that, when he overheard the jurors, they were on the seventh floor of the court house in the cell area.

Counsel testified that he was appointed as a public defender to represent the Petitioner. The Petitioner told him about a “Joe Smith” who overheard a conversation between the jurors. Counsel tracked down a “Joseph D. Smith” but discovered that no Joe Smith had a court appearance during the Petitioner’s trial. Later, in a letter postmarked December 13, 2002, the Petitioner informed Counsel that the inmate’s name was Joe Martin. Counsel did not find in his search of the court’s electronic database that Martin had a court appearance during the first part of December of 2002. On cross-examination, Counsel testified that he was unsure whether he looked at whether Martin had a court hearing or whether he only looked for Joe Smith’s court appearances. Counsel testified that the Petitioner also described for him in “vivid” detail the transportation officer that was with Martin that day, and Counsel did not follow up by trying to find the transportation officer.

Based upon this evidence, the trial court dismissed the petition finding, in relevant part:

The petitioner contends that he was denied effective assistance of counsel due to the following acts or omissions: (1) trial counsel failed to locate and call Joe Martin as a witness at his Motion for New Trial;

. . . .

The petitioner first argues that trial counsel failed to locate and call Joe Martin as a witness at his Motion for New Trial. The petitioner testified that while the jury was deliberating, another inmate, Joe Martin informed him that he overheard the jurors talking about his case. Mr. Martin testified that he was at court the same time as the petitioner. Mr. Martin testified that he was there on his own post-conviction proceeding. While he was being transported from his holding cell he observed what he thought were jurors on a case. Mr. Martin testified that he asked them to hurry up as he was waiting on the petitioner to be finished for the day so they could be transported back to jail as they were the only two inmates left in the holding cells. Mr. Martin testified that one of the jurors stated that it “won’t take long, we will hurry up and convict him.” [Counsel] testified that the petitioner told him about Mr. Martin but told him the name was

Joe Smith. [Counsel] testified that it was not until later that he received a letter from the petitioner giving the correct name of Joe Martin. [Counsel] testified that he did not locate Joe Martin because he did not see in the court's computer system where a Joe Martin had court the same day as the petitioner. Joe Martin's credibility with the Court is questionable in that he is a fellow inmate with his own murder conviction. Nor does it seem likely that the Department of Corrections guards would stop for an impromptu chat with jurors. There was not clear and convincing proof that these people were in fact confronted by Mr. Martin and that they were in fact jurors in the petitioner's case. There were no jurors called to support this contention. Thus the petitioner has not carried his burden on this issue.

....

The petitioner received as fair of a trial as any defendant could have, was represented by extremely competent and qualified counsel that was not able to convince a jury to overlook the facts in this case. As a result of his convictions, the Court imposed a just sentence.

Accordingly, the trial court dismissed the petition for post-conviction relief on May 9, 2006. The Petitioner filed a pro se notice of appeal on February 6, 2007, and his attorney filed one on February 28, 2007.

II. Analysis

On appeal, the Petitioner contends that the trial court erred when it dismissed his petition for post-conviction relief. The Petitioner argues that Counsel was ineffective by failing to locate Joe Martin and present Martin's testimony at the hearing on the Petitioner's motion for a new trial. The State counters first that the Petitioner has waived this argument because he untimely filed his notice of appeal. Further, the State asserts that the Petitioner did not meet his burden of proving that Counsel was ineffective.

As the State argues, the Petitioner has failed to file a timely notice of appeal in this case. The Rules of Appellate Procedure require that a notice of appeal be filed within thirty days after the entry of judgment from which a defendant is appealing. Tenn. R. App. P. 4(a). Here, the order dismissing the Petitioner's petition was filed on May 9, 2006, and the notice of appeal was filed on February 28, 2007, more than nine months after the judgment was entered. This Court may waive an untimely filing of a notice of appeal "in the interest of justice," which we choose to do. *State v. Scales*, 767 S.W.2d 157, 158 (Tenn. 1989).

In order to obtain post-conviction relief, a petitioner must show that his or her conviction or sentence is void or voidable because of the abridgment of a constitutional right. T.C.A. § 40-30-103 (2006). The petitioner bears the burden of proving factual allegations in the petition for post-conviction relief by clear and convincing evidence. T.C.A. § 40-30-110(f) (2006). Upon review, this Court will not re-weigh or re-evaluate the evidence below; all questions concerning

the credibility of witnesses, the weight and value to be given their testimony and the factual issues raised by the evidence are to be resolved by the trial judge, not the appellate courts. *Momon v. State*, 18 S.W.3d 152, 156 (Tenn. 1999); *Henley v. State*, 960 S.W.2d 572, 578-79 (Tenn. 1997). A post-conviction court's factual findings are subject to a de novo review by this Court; however, we must accord these factual findings a presumption of correctness, which can be overcome only when a preponderance of the evidence is contrary to the post-conviction court's factual findings. *Fields v. State*, 40 S.W.3d 450, 456-57 (Tenn. 2001). A post-conviction court's conclusions of law are subject to a purely de novo review by this Court, with no presumption of correctness. *Id.* at 457.

The right of a criminally accused to representation is guaranteed by both the Sixth Amendment to the United States Constitution and Article I, section 9 of the Tennessee Constitution. *State v. White*, 114 S.W.3d 469, 475 (Tenn. 2003); *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999); *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). The following two-prong test directs a court's evaluation of a claim for ineffectiveness:

First, the [petitioner] must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the [petitioner] by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable. Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984); *State v. Melson*, 772 S.W.2d 417, 419 (Tenn. 1989).

In reviewing a claim of ineffective assistance of counsel, this Court must determine whether the advice given or services rendered by the attorney are within the range of competence demanded of attorneys in criminal cases. *Baxter*, 523 S.W.2d at 936. To prevail on a claim of ineffective assistance of counsel, a petitioner must show that "counsel's representation fell below an objective standard of reasonableness." *House v. State*, 44 S.W.3d 508, 515 (Tenn. 2001) (citing *Strickland*, 466 U.S. at 688 (1984)).

When evaluating an ineffective assistance of counsel claim, the reviewing court should judge the attorney's performance within the context of the case as a whole, taking into account all relevant circumstances. *Strickland*, 466 U.S. at 690; *State v. Mitchell*, 753 S.W.2d 148, 149 (Tenn. Crim. App. 1988). The reviewing court must evaluate the questionable conduct from the attorney's perspective at the time. *Strickland*, 466 U.S. at 690; *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982). In doing so, the reviewing court must be highly deferential and "should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Burns*, 6 S.W.3d at 462. Finally, we note that a petitioner in a criminal case is not entitled to perfect representation, only constitutionally adequate representation. *Denton v. State*, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996). In other words, "in considering claims of

ineffective assistance of counsel, ‘we address not what is prudent or appropriate, but only what is constitutionally compelled.’” *Burger v. Kemp*, 483 U.S. 776, 794 (1987) (quoting *United States v. Cronin*, 466 U.S. 648, 665 n.38 (1984)). Counsel should not be deemed to have been ineffective merely because a different procedure or strategy might have produced a different result. *Williams v. State*, 599 S.W.2d 276, 279-80 (Tenn. Crim. App. 1980). The fact that a particular strategy or tactic failed or hurt the defense does not, standing alone, establish unreasonable representation. *House*, 44 S.W.3d at 515 (citing *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996)). However, deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation. *House*, 44 S.W.3d at 515.

If the petitioner shows that counsel’s representation fell below a reasonable standard, then the petitioner must satisfy the prejudice prong of the *Strickland* test by demonstrating “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694; *Nichols v. State*, 90 S.W.3d 576, 587 (Tenn. 2002). This reasonable probability must be “sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694; *Harris v. State*, 875 S.W.2d 662, 665 (Tenn. 1994).

First, we note that issues of credibility rest soundly with the post-conviction court. *Momon*, 18 S.W.3d at 156. Nothing in the record preponderates against the post-conviction court’s finding that Counsel’s performance was not deficient with regard to his failure to find Martin in order to have him testify at the motion for new trial. The post-conviction court found that Martin’s story was not credible. Further, the Petitioner originally gave Counsel the name “Joe Smith,” and Counsel attempted to locate a prisoner by that name. The Petitioner later gave Counsel the name “Joe Martin,” and Counsel may not have researched whether an inmate by that name had a court date at or near the time of the Petitioner’s trial. Under these circumstances, Counsel’s failure to locate Martin and have him testify at the motion for new trial was not deficient. Further, the Petitioner has not proven that he was prejudiced by Counsel’s actions by showing that there is a reasonable probability that, but for this error, the proceeding would have been different. Accordingly, the Petitioner is not entitled to relief on this issue.

III. Conclusion

Based upon the foregoing reasoning and authorities, we affirm the judgment of the post-conviction court.

ROBERT W. WEDEMEYER, JUDGE